EDITOR'S NOTE

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86-6169

No. _____

ORIGINAL

SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM WAYNE THOMPSON,

Petitioner

v.

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

In a capital case against a sixteen year old defendant, the trial court admitted two gruesome photographs of the murder victim into evidence. The Court of Appeals stated that admitting the "ghastly, color" photographs into evidence was error that served no purpose other than to inflame the jury, but found that the error was harmless because evidence of the defendant's guilt was so strong. The first question presented is:

May the admission of inflammatory evidence in a capital case against a sixteen year old defendant be deemed harmless error merely because of strong evidence of guilt, when such evidence also prejudices the defendant's right to fair, full jury consideration of all mitigating circumstances-- including age-- during death penalty deliberations?

II

Whether the infliction of the death penalty on an individual who was a child of fifteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

PARTIES TO THE PROCEEDINGS BELOW

In the Court of Appeals of Oklahoma, Case No. F-84-29, the Appellant was William Wayne Thompson (petitioner in this action). The Appellee was the State of Oklahoma (respondent in this action).

In the District Court of Grady County, Oklahoma, Case No. CRF-83-45, the plaintiff was the State of Oklahoma and the defendant was William Wayne Thompson.

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OPINION BELOW

The opinion of the Court of Criminal Appeals is published as Thompson v. State at 724 P.2d 780. The opinion is reproduced in the Appendix.

There is no formal trial court opinion.

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. §1257 (3). The opinion of the Court of Criminal Appeals was entered on August 29, 1986. The Court of Criminal Appeals denied a timely petition for rehearing on September 24, 1986. On November 18, 1986, Mr. Justice White entered an order extending the time for petitioning for a writ of certiorari up to and including December 23, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. VI (excerpt):

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

U.S. Const., Amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend. XIV (excerpt):

"No State shall . . . deprive any person of life . . . without due process of law . . ."

STATEMENT OF CASE

William Wayne Thompson, age sixteen, (hereinafter "the defendant") was convicted and sentenced to die for a first degree murder committed while he was still age fifteen. He had previously been certified to stand trial as an adult.

The evidence at trial showed that the defendant was the youngest of a group of four persons who participated in the murder of Charles Keene, defendant's former brother-in-law. He was the only minor child among the four accused of the crime. The victim had been abducted, beaten, shot twice and his throat, chest and abdomen had been cut. Witnesses for the prosecution overheard one of the men attacking Keene say, "[t]his is for the way you treated our sister." The apparent motive for the murder, according to this and other evidence introduced by the defense, was anger over Keene's alleged abuse and beating of Vicki Keene, the sister of two of the defendants.

The four accused of the crime were Anthony Mann (defendant's older brother), Bobby Glass, Richard Jones and the defendant. All were convicted in separate trials and all were sentenced to death.

The jury found one aggravating circumstance -- that the crime was "especially heinous, atrocious or cruel" -- but declined to accept the prosecutor's additional claim that the boy would commit violent criminal acts in the future.

During the guilt and penalty phases of the trial, the prosecutor introduced and emphasized two color photographs of the murder victim's body, which had been thrown into the Washita River and had remained there for almost a month. The Court of Criminal Appeals later characterized these photographs as "gruesome," and stated that "[a]dmitting them into evidence served no purpose other than to inflame the jury." 724 P.2d at 782.

> "We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value. We fail to see how they could possibly assist in the determination of defendant's guilt. The trial court's admission of these two photographs was error."

Id. at 783.

Nevertheless, the Court of Criminal Appeals affirmed the judgment and sentence. The court held that the execution "of a minor certified to stand trial as an adult constitutes neither cruel nor unusual punishment." 724 P.2d at 784. The admission of the "ghastly, color photographs with so little probative value" was found to be harmless error because evidence of the defendant's guilt was "so strong." 724 P.2d at 783.

Preservation of Issues

As reported by the Court of Criminal Appeals, attorneys for the defendant challenged the admission of the photographs at trial and on appeal. Tr. Trans. 628-29; 724 P.2d at 783.

As noted by the Court of Criminal Appeals, the defendant also argued on appeal that the execution of a minor for a crime committed at age fifteen was cruel and unusual punishment that violated the Eighth and Fourteenth Amendments of the United States Constitution. 724 P.2d at 784; Brief of Appellant pp. 23-27.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

The introduction of inflammatory evidence in a capital case against a sixteen year old defendant cannot be deemed harmless error merely because of strong evidence of guilt. Such evidence also prejudices the defendant's right to fair, full jury consideration of all mitigating circumstances-- including age-- during death penalty deliberations.

"[W]here life itself is what hangs in the balance, a fine precision in the process must be insisted upon." Lockett v. Ohio, 438 U.S. 586, 620 (1978) (Marshall, J., concurring). Neither fine precision nor basic fairness was achieved in death penalty deliberations in this case.

The defendant was sentenced to death when the jury decided that one-- and only one-- aggravating factor was present. This determination was made-- despite the defendant's youth-- after the prosecutor repeatedly emphasized inflammatory, gruesome

photographs of the murder victim's remains.

Though the Oklahoma Court of Criminal Appeals condemned the prosecutor's actions and held that the trial court's decision to allow the inflammatory evidence was error, the appellate court used the incantation of "harmless error" to hold that defendant's death sentence was proper.

In this case, the misapplication of the harmless error concept denies the defendant's consitutional right to a full, fair consideration of all mitigating circumstances-- including the youth of the defendant-- as guaranteed by Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

A. In closing argument during the penalty phase of the trial, the prosecutor repeatedly emphasized gruesome photographs that the Oklahoma Court of Criminal Appeals later described as inflammatory.

The Oklahoma Court of Criminal Appeals failed to consider fully the effect of evidence it had already found to be gruesome, ghastly, inflammatory, prejudicial, of little probative value and erroneously introduced. Specifically, the court did not examine or appreciate the effect of such evidence on the jury's deliberations during the penalty phase of trial.

The color photographs of the victim's body had been introduced to help establish the guilt of the accused. When the jury did not request to see the photographs while deliberating on the issue of guilt, the prosecutor complained in closing argument during the penalty phase:

> "[T]here is something in this case that I want to tell you in the very beginning, I did not show you the photographs, you did not ask that the photographs of Charles Keene, the physical evidence be produced to you upstairs in the jury room in the first phase of this trial. I didn't, but you've got to ask for these exhibits to have them brought up to that jury room."

Tr. Trans. 848. Later in his closing argument, the prosecutor repeated his emphasis on the inflammatory evidence:

> "And now for the first time you actually get to see photographs of the mutilated body of Charles Keene . . ."

Tr. Trans. 850. Still later, defense counsel complained about prosecutor's emphasis on these photographs.

> "At this time, Judge, I'd like the record to reflect that Mr. Burns [the prosecutor] has placed on the podium . . . right in front of the jury various pictures of the deceased and in the past five or ten minutes has been waving them in front of the jury. The only value this has is to inflame the passions of the jurors."

Tr. Trans. 857. The judge overruled the defense counsel's objection, but warned the prosecutor to stop waving the pictures in front of the jury.

The prosecutor's conduct and tactics were not subtle. In closing argument, the prosecutor used the inflammatory evidence to distract the jury from what he described as "the problem": "[W]hat to do with a guilty person who has killed somebody else that is sixteen years old." Tr. Trans. 849. The prosecutor tried to deny the fact of the defendant's youth by arguing that he was an adolescent only in years. Id. After a detailed and graphic description of the crime with the aid of the inflammatory photographs, the prosecutor closed: "Its not the sixteen year old, folks, that can do that." Tr. Trans. 865.

The prosecutor's tactics-- aided by the inflammatory evidence-- were successful. Eventually, the jury recommended the death sentence on the sole basis of one statutory aggravating factor-- that the murder was especially heinous, cruel and atrocious. Tr. Trans. 870.

B. In a capital case, the defendant has a right to full, fair consideration of all mitigating circumstances-- including age.

First degree murder is punishable by death or by life imprisonment. 21 Okla. Stat. §701.9 The Oklahoma system for imposing the death sentence requires the jury to find aggravating circumstances before imposing the death penalty. 21 Okla. Stat. §§ 701.10, 701.11, 701.12. 21 Okla. Stat. §701.12. Even if the jury finds an aggravating factor, the jury retains the discretion not to assess the death sentence whether or not the defense has offered mitigating evidence. Parks v. State, 651 P.2d 868 (Okla.

Cr. 1982).

As a result, "[i]n a capital sentencing proceeding before a jury, the jury is called upon to make a `highly subjective, `unique, individualized judgment regarding the punishment that a particular person deserves.'" Turner v. Murray, ___ U.S. ___, 106 S.Ct. 1683, 1687 (1986) quoting Caldwell v. Mississippi, 472 U.S. ___, ___, n. 7, 105 S.Ct. 2633, 2645 n. 7 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)). Moreover, as this Court has consistently held, during the penalty phase of a capital case, juries and judges must give full and fair consideration to all mitigating factors, including the youth of the offender. Lockett v. Ohio, 438 U.S. 536 (1978); Bell v. Ohio, 438 U.S. 637 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). After Eddings, the importance of this principle should have been clear to the state of Oklahoma.

> "Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly `during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. . . ."

455 U.S. at 115-116. Indeed, the language of the Court in Eddings reflects understandings about the nature of mitigating factors not easily communicated to a jury confronted with inflammatory, prejudicial, gruesome photographs of a murder victim and a prosecutor's repeated arguments that the defendant is not a normal sixteen year old. Tr. Trans. 266, 762, 849, 854.

> "Eddings was not a normal 16 year old; he had been deprived of the care, concern and paternal attention that children deserve. . . . [I]t is not disputed that he was a juvenile with serious emotional problems. . . . All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is

> itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."

455 U.S. at 116 (emphasis added).

Since "in the end it is the jury that must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death," Turner v. Murray, 106 S.Ct. at 1687, trial and appellate courts in any capital case must be sensitive to the possibility of prejudicing a jury at the penalty phase, as well as the guilt phase of trial.

> "The qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."

Id., 106 S.Ct. at 1688 (quoting California v. Ramos, 463 U.S. 992, 998-999 (1983)).

C. In a capital case, the introduction of inflammatory and gruesome evidence prejudicing jury deliberations over the death penalty cannot be dismissed as mere harmless error.

Appellate courts reviewing death penalty cases cannot fulfill their responsibilities to ensure that the defendant has received fair and full consideration by resorting to the incantation of "harmless error" based on evidence of guilt. To do so virtually repeats Oklahoma's error in Eddings, in which the Oklahoma Court of Criminal Appeals "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." 455 U.S. at 113.

As this Court stated in Zant v. Stephens, 462 U.S. 862 (1983):

> "`It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.' Gardner v. Florida, 430 U.S. 349, 358 (1977). Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable

claim of error."

462 U.S. at 885.

In this case, the Oklahoma Court of Criminal Appeals used evidence of the defendant's guilt to find that obvious error was only harmless. The appellate court gave no scrutiny-- certainly not careful scrutiny-- whether the prosecutor's inflammatory evidence prejudiced the capital sentencing determination. In this context, the fact that the jury found only one aggravating factor justifying the death penalty renders the judgment indefensible. Cf. Watson v. Blackburn, 756 F.2d 1055 (5th Cir. 1985) (death sentence need not be overturned when one aggravating circumstance is invalidated only if other valid aggravating factors exist).

This Court must not rely on some speculative possibility that the jury might still have decided to sentence a fifteen-year-old defendant to die without the prejudicial evidence.

> "'Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.'
>
> "[R]ational appellate review of capital sentencing decisions . . . requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had it correctly applied the law. Such post hoc justification of a sentencing decision, which depends on a rationale for imposing death distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities. . . Only where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result should a sentence be affirmed despite constitutional error."

Proffitt v. Wainwright, 685 F.2d 1227, 1269 (11th Cir. 1982) cert. denied 464 U.S. 1002 (1983) (rejecting state's harmless error argument, when court considered improper nonstatutory aggravating circumstances) quoting Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated on other grounds ___ U.S. ___, 73 L.Ed.2d 1326 (1982). See also, e.g.: United States v. Gomer, 764 F.2d 1221 (7th Cir. 1985) (defendant need not show explicit reliance on an improper sentencing factor to obtain relief; it is sufficient to show that it was "not improbable" that the trial court was influenced by improper factors).

In Eddings and Lockett, this Court mandated that the death penalty should be imposed, if at all, only after juries undertake a careful, fair, sensitive, precise evaluation of all mitigating circumstances. In this case, the benefits of this procedural safeguard were effectively denied to the defendant by inflammatory, prejudicial evidence introduced by an over-zealous prosecution.

II

The execution of an individual who was a child of fifteen at the time of the crime is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Oklahoma is one of only three states that has neither established a minimum age for imposing the death penalty nor explicitly provided that age is a mitigating factor in a capital case. Oklahoma is the only one of these three (Delaware and South Dakota are the other two) to have a juvenile on death row-- the defendant in the instant case.

The defendant was sentenced to death for a crime committed while he was still a child under the laws of Oklahoma. Yet Oklahoma has enacted no statute explicitly authorizing the execution of minors for crimes committed while still at the young age of fifteen. In 10 Okla. Stat. §1101, the term "child" is defined as "any person under the age of eighteen (18) years, except any person sixteen (16) or seventeen (17) years of age who is charged with murder" and certain other specified offenses. In 10 Okla. Stat. §1104.2, the state has provided that persons who are sixteen or seventeen and who are charged with murder are

automatically considered to be adult, unless the person successfully moves to be certified as a child. This "automatic" certification was not the basis for trying the defendant in this case as an adult.

The defendant in this case was certified to stand trial as an adult under a separate statute, 10 Okla. Stat. §1112. This statute allows a child of any age who is charged with an offense that would be a felony if committed by an adult to be tried as an adult, if (i) the state can establish "the prosecutive merit" of the case, and (ii) if the court certifies "that such child shall be held accountable for its acts as if he were an adult." This certification of accountability may occur only after the court has examined whether there are "prospects for reasonable rehabilitation of the child."

Again, there appears to be no explicit minimum age limit on which children might be certified as adults under this process. Moreover, this statute makes no reference to the possibility of the death penalty. The prospect of capital punishment of such children exists because of the generally-applicable statute for punishment of first degree murder. 21 Okla. Stat. §§ 701.7, 701.9, 701.10, 701.11.

A. This case presents an important, unresolved issue respecting the meaning of the constitutional prohibition of cruel and unusual punishments. This issue was previously examined, but not decided in Eddings v. Oklahoma.

In Eddings v. Oklahoma, 455 U.S. 104 (1982) cert. granted, 450 U.S. 1040 (1981) this Court previously agreed to decide "[w]hether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States." Brief for Petitioner at i, Eddings v. Oklahoma. Eventually, however, the Court upheld Eddings' claim because the trial court had not given adequate consideration to all mitigating evidence.

The majority in Eddings held that the "chronological age of a minor is itself a relevant mitigating factor of great weight." 455 U.S. at 116. However, as a concurring opinion of Justice

O'Connor and a dissenting opinion of Chief Justice Burger made clear, the majority did not "decid[e] the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16." Id. at 119 (O'Connor, J., concurring).

The issue remains unresolved, but it is still as important as when this Court first considered the problem in its review of Eddings.

B. Judicial review of juvenile death sentences is faithful to the original purposes of the constitutional prohibition against cruel and unusual punishment.

Although it is true that "'specific' provisions of the Constitution, no less than [general provisions such as] 'due process' lend themselves as readily to 'personal' interpretations. . . ," Griswold v. Connecticut, 381 U.S. 479 (1965) (Harlan, J., concurring), it is also true that a few constitutional provisions seem explicitly to mandate an on-going judicial search for evolving principles of humanity and decency. The Eighth Amendment is one such provision. J. Ely, Democracy and Distrust 13-14 (1980).

The Framers adopted the provision over objections that it was "too indefinite," apparently because "the clause expressed a great deal of humanity," 7 Annals of Cong 754 (1789) (remarks of Representatives Smith and Livermore), discussed in Weems v. United States, 217 U.S. 349, 369 (1910) and Furman v. Georgia, 408 U.S. 238, 243-45, 262-263 (1972). Moreover, like other declarations of basic rights, the Eighth Amendment required judicial interpretation and judicial protection. When the Bill of Rights was incorporated into the Constitution, it was expected that "independent tribunals of justice [would] consider themselves in a peculiar manner the guardians of those rights." Address of James Madison to the U.S. House of Representatives (June 8, 1789), reprinted in 5 The Writings of James Madison 385 (G. Hunt ed. 1904). It was hoped that the courts would "naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration

of rights." Id.

In Weems v. United States, 217 U.S. 349 (1910), the Court adopted a view of the Eighth Amendment that is faithful to these original purposes of the express prohibition. As the Court invalidated a sentence prescribed by a legislature for a particular offense, it recognized that:

> "The clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

217 U.S. at 378. The unalterable reality is that if federal courts refuse to consider the nation's traditions of decency when examining juvenile death sentences in light of the Eighth Amendment's prohibition of cruel and unusual punishment, "the words of the Constitution [have] become little more than good advice," Trop v. Dulles, 356 U.S. 86, 104 (1958), despite the expressed hopes of the Framers of the Eighth Amendment.

C. States should not execute individuals for crimes committed while they are still children.

The meaning of the Eighth Amendment "must be drawn from the evolving standards of decency that mark the progress of an evolving society." Trop v. Dulles, 356 U.S. 86, 101 (1958) The "basic policy reflected in [the Eighth Amendment] is firmly established in the Anglo-American traditions of criminal justice." Id. at 100-101. It appears settled that these traditions allow capital punishment in many cases. Id. at 99-100; Gregg v. Georgia, 428 U.S. 153 (1976). It appears equally obvious that imposition of the death penalty in certain cases may offend the nation's jurisprudential traditions. Coker v. Georgia, 433 U.S. 595 (1977) (death penalty is grossly disproportionate and excessive punishment for the crime of rape).

Among the cases in which the death penalty is cruel and unusual is this case in which a minor has been convicted and sentenced to die for a crime committed at age fifteen. Killing minors for crimes committed while still children offends fundamental standards of decency and humanity.

1. The death penalty for a crime committed by a child of fifteen is punishment that offends American traditions of justice.

Juvenile executions have always been rare. In part, this fact reflects the traditions of Anglo-American law, which require that children be treated differently. As Justice Frankfurter aptly noted, "[c]hildren have a very special place in life which the law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Manifestation of this different treatment are limitations on youths' right to vote, contract, sue or be sued, dispose of property by will, marry, accept employment, purchase liquor, drive vehicles. F. Zimring, The Changing Legal World of Adolescence (1982). Ironically, juveniles certified to stand before the criminal justice system as if they were adults are prohibited from serving on a jury, such as the one that decides their fate.

The development of a juvenile justice system was a manifest rejection of harsh, adult punishment for the unlawful acts of children. In Re Gault, 387 U.S. 1, 15-16 (1967). However, the perception that youths should not be subjected to the harshest punishments was an informal premise of Anglo-American criminal justice well before the development of separate juvenile justice systems. Younger offenders may not have had de jure benefit of more lenient punishments, but the young did receive de facto benefits, such as shorter sentences, special incarceration facilities, community-based sanctions or outright commutation of criminal sentences. See, e.g., Fox, "Juvenile Justice Reform: A Historical Perspective," 22 Stan. L. Rev. 1187 (1970).

Beginning with the 1890's and through the 1920s, the total number of juvenile executions each decade ranged from twenty to twenty-seven, comprising about 1.6 to 2.3% of all executions. The number of juvenile executions rose in the 1930s, but the percentage of juvenile executions was still only about 2.5% of the total. In the nineteen forties, the percentage of juvenile executions peaked, but then declined precipitously. Only sixteen juveniles were executed in the 1950s. In 1964, juvenile executions ended temporarily with the death of a seventeen year

old who had been convicted of rape. Echols v. State, 370 S.W.2d 892 (Tex. Crim. App. 1963). Since the resumption of executions in the late nineteen-seventies, only three juveniles have been executed. See, e.g., Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363 (1986).

Jury sentencing patterns in juvenile death penalty cases further show the harshness of capital punishment in such cases. In the years 1982 to the present, approximately 280 death sentences per year were imposed by juries throughout the United States. Only 1% to 2% of these death sentences were imposed on individuals for crimes committed while under the age of eighteen. Eleven such sentences were imposed in 1982, ten in 1983, six in 1984, three in 1985 and six thus far in 1986. Id. Jury sentencing practices for fifteen-year-old offenders is even more striking. Of the approximately 1,400 death sentences imposed from 1982 through 1986, only five (0.3%) have been for crimes committed when the convicted individual was age fifteen. Id.

Currently, fourteen states expressly exclude youths under age sixteen, seventeen or eighteen from death penalty statutes.[1] Some of these states have used the death penalty for years, but never allowed execution of juveniles below a certain age. For example, Texas, has always maintained a death penalty, but has excluded juveniles under the age of seventeen from the death penalty since at least 1897. Texas Penal Code Ann. §8.07(d) (Vernon Supp. 1982). Moreover, a clear trend seems to be emerging. In the past five years, six states (Colorado, Nebraska, New Jersey, Ohio, Oregon and Tennessee) have enacted a minimum age of eighteen in their death penalty statutes. Other

1. California (Cal. Penal Code §190.5; (West Supp. 1985)); Colorado (Col. Rev. Stat. §16-10-103 (1985)); Connecticut (Conn. Gen. Stat. Ann. §53a-46a(g)(1) (West Supp. 1985); Georgia (Ga. Code Ann. § 17-9-3 (1982); Illinois (Ill. Ann. Stat. ch. 38, § 9-1(b) (Smith-Hurd Supp.)); Nebraska (Nebr. Rev. Stat. §28-105.01 (1982)); Nevada (Nev. Rev. Stat. §176.025 (1979)); New Hampshire (N.H. Rev. Stat. Ann. §630:5(II)(b)(5) (Supp. 1981)); New Jersey (N.J. Stat. Ann. §2C: 11-3f (West 1986)); New Mexico (N.M. Stat. Ann. §31-18-14 (1979)); Ohio (Ohio Rev. Code Ann. §2929.02(E) (Page 1984)); Oregon (Ore.Rev.Stat. 161.615 (1985)); Tennessee (Tenn. Code Ann. §37-1-134(1) (1984)); and Texas (Tex. Penal Code Ann. §8.07(d) (Vernon Supp. 1985)).

states, such as Georgia and Washington, are currently considering similar measures. Thirteen other states establish a minimum age limit through either juvenile court waiver statutes or statutes giving concurrent or exclusive jurisdiction to criminal courts for capital murders committed by offenders of a certain age or older.[2]

Six other states explicitly mandate chronological youth as a statutory mitigating circumstance to be considered in the sentencing of an offender.[3]

Only three states-- Delaware, South Dakota and Oklahoma -- continue to have no minimum age for the death penalty and no express provisions that youth be regarded as a mitigating factor in the death sentencing decision.[4] (Of course, in Eddings v. Oklahoma, this Court found that age must be so considered.) Of these three, only in Oklahoma is any person under a death sentence for crimes committed under the age of eighteen-- the defendant in this case.

2. Capital punishment of juveniles is arbitrary, freakish punishment that makes no measurable contribution to the goals of punishment.

Since Oklahoma has, in essence, decided not to establish any minimum age for juvenile executions-- or has made no decision at all, except to allow case-by-case decision-making -- the rationality and utility of executing a minor for an act committed

2. Alabama (Ala. Code §12-15-34(a) (1977)); Arkansas (Ark. Stat. Ann. §41-61712 (Supp. 1985)); Idaho (Idaho Code §16-1806A(1) (Supp. 1984)); Indiana (Ind. Code Ann. §31-6-2-4(c) (Burns Supp. 1982)); Kentucky (Ky. Rev. Stat. Ann. §20Code §16-1806A(1) (Supp. 1984)); Indiana (Ind. Code Ann. §31-6-2-4(c) (Burns Supp. 1982)); Kentucky (Ky. Rev. Stat. Ann. §208E.070(2) (Baldwin 1980)); Louisiana (La. Rev. Stat. Ann. §13:1570(A)(5) (1983)); Mississippi (Miss. Code Ann. §43-21-151 (1985)); Missouri (Mo.Ann. Stat. §211.071 (Vernon Supp. 1985)); Montana (Mont. Code Ann. §31-5-206 (1985)); North Carolina (N.C. Gen. Stat. §7A-608 (1981)); Pennsylvania (Pa. Code Stat. §6355(a)(1) (1985)); Utah (Utah Code Ann. §78-3a-25(1)(Supp. 1983)); and Virginia (Va. Code Ann. §16.1-269(A) (1982)).

3. Arizona (Ariz. Rev. Stat. Ann. §13-703(G)(5) (Supp. 1985)); Florida (Fla. Stat. Ann. §921.141(6)(g) (West Supp. 1984))); Maryland (Md. Code art. 27, §413(g)(5) (Supp. 1985)); South Carolina (S.C. Code Ann. §16-3-20(c)(b)(7) (1985))); Washington (Wash. Rev. Code §10.95.070 (7) (Supp. 1986))); and Wyoming (Wyo. Stat. §6-2-102(j)(vii) (Repl. 1983)

4. 11 Del. Code Ann. § 4209(c) (Repl. 1979); 21 Okla. Stat. §701.01 (West 1983); S.D. Codified Laws Ann. 23A-27A-1 (Supp. 1984).

while still a child is impossible to discern.

The total number of juvenile death sentences and executions throughout the United States is miniscule. Also, the manner in which those few victims of juvenile capital punishment are selected for the harshest adult punishment appears to be almost totally random. Approximately 6,000 juveniles have been arrested between 1982 and 1986 for murder and non-negligent homocide. Federal Bureau of Investigation, Uniform Crime Reports 1982-1986. Of those 6,000 cases, only thirty-six (0.6%) have resulted in the death sentence. Even if only one-fourth of those arrests (1,500) were for crimes which could have been prosecuted as capital cases, the thirty-six death sentences still constitute only 2% of the resulting penalties imposed by the legal system.

To paraphrase Justice Stewart, death sentences for juveniles are cruel and unusual in the same way that being struck by lightning is cruel and unusual. Furman v. Georgia, 408 U.S. at 309 (Stewart, J. concurring). Those few juveniles selected for the death penalty are only a very small portion of all juveniles who commit criminal homocides. The actual execution of such juveniles is so rare as to be freakish and irrational, serving no reasonable purposes of retribution or deterrence.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Petitioner respectfully requests that this Court vacate the death sentence in this case and grant such other relief as it deems appropriate. In the alternative, petitioner requests that this Court remand this case for resentencing after a fair, full consideration of all mitigating circumstances without the prejudicial effects of inflammatory evidence.

Respectfully submitted,

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APPENDIX

William Wayne THOMPSON, Appellant,

v.

STATE of Oklahoma, Appellee.

No. F-84-29.

Court of Criminal Appeals of Oklahoma.

Aug. 29, 1986.

Rehearing Denied Sept. 24, 1986.

Defendant was convicted of first-degree murder and sentenced to death, by jury verdict, in the District Court of Grady County, James R. Winchester, J. Defendant appealed. The Court of Criminal Appeals, Breti, J., held that: (1) it was not error to admit videotape depicting recovery of victim's body from river; (2) prosecutor's injection of criminal record of distant relative of witness was error but not prejudicial; (3) death sentence for murderer who was 15 at time of murder did not constitute cruel and/or unusual punishment; and (4) facts amply supported conclusion that murder was heinous, atrocious, or cruel.

Affirmed.

Bussey, J., specially concurred and filed opinion.

Parks, P.J., specially concurred and filed opinion.

1. Criminal Law ⇐1037.1(2)

Prosecutor's comments, which were made during murder prosecution voir dire and which may have set the stage for long line of requests for sympathy for victim, did not constitute fundamental error.

2. Jury ⇐33(2.1)

Exclusion of potential jurors simply because they were opposed to capital punishment did not deny murder defendant trial by fair and impartial cross section of community.

3. Criminal Law ⇐438(8)

Videotape depicting recovery of victim's body from river was admissible in murder prosecution to show condition and location of body at time it was recovered; videotape was not gruesome and no close-up views of body were shown to jury.

4. Criminal Law ⇐438(6)

Photograph of victim showing chain wrapped around victim's legs and concrete block was admissible in murder prosecution to show condition of body at time it was recovered; picture was not particularly gruesome.

5. Criminal Law ⇐438(7), 1169.1(10)

Admission of two gruesome color photographs in murder prosecution was error, but it was not reversible error in view of strong evidence against defendant.

6. Criminal Law ⇐723(4)

Prosecutor's comments on defendant's propensity to commit acts of violence in the future were not comments designed to arouse societal alarm and were fair comment on the evidence within permissible range of closing arguments, in view of fact that defendant's propensity to commit acts

of violence in the future was one of the aggravating circumstances.

7. Criminal Law ⇐1170½(1)
Witnesses ⇐345(1)

Prosecutor's injection of criminal record of distant relative of witness had no place in murder proceeding, but was not prejudicial and did not warrant modification of sentence.

8. Criminal Law ⇐722(2)

Prosecutor's characterization of 16-year-old murder defendant as being emotionally older than his chronological age was proper in view of the evidence.

9. Criminal Law ⇐1213.8(8)

Sentencing defendant, who was 15 at time of the offense, to death did not constitute cruel and/or unusual punishment; defendant had been certified to stand trial as adult. U.S.C.A. Const.Amend. 8; Const. Art. 2, § 9.

10. Homicide ⇐354

Failure of prosecutor to present evidence of specific aggravating circumstances at preliminary hearing in murder prosecution did not deprive trial court of jurisdiction to sentence defendant to death.

11. Criminal Law ⇐667(1)

Cross-examination of seven-year-old son of victim in murder prosecution was not improperly restricted by trial court, even though trial court instructed defense counsel not to ask certain types of questions; defense counsel neither indicated he wished to ask those questions nor objected to the limitation.

12. Criminal Law ⇐824(1)

Trial court was not required to instruct jury, sua sponte, that court would impose life sentence if jury could not reach verdict within reasonable time.

13. Homicide ⇐354

Evaluation of heinous-atrocious-cruel aggravating circumstances in prosecution of 16-year-old for murder of person who had his leg broken, his throat and chest slashed, and who knew for some time that his attackers ultimately were going to kill him, was not arbitrary, and death penalty was constitutional. U.S.C.A. Const. Amends. 8, 14.

14. Criminal Law ⇐1042

Defendant, who failed to object at trial to testimony of clinical psychologist concerning probability that defendant would commit criminal acts of violence that would constitute continuing threat to society, on theory that such evidence could not be used as defendant was not apprised of his rights and did not waive them, forfeited argument on appeal.

15. Homicide ⇐343

Error, if any, in failing to afford murder defendant psychiatric witness to counter State's psychiatric witness, was harmless and did not require modification or reversal, in view of fact that jury did not find existence of aggravating circumstances that State intended to prove by psychiatric witness. 20 O.S.1981, § 3001.1.

16. Homicide ⇐354

Evidence that murder victim was abducted from his home, severely beaten by four men, shot twice, and had his leg broken and his throat and chest slashed with knife, amply supported conclusion that murder was heinous, atrocious, or cruel for purposes of death sentence.

17. Homicide ⇐354

Jury's imposition of death sentence against defendant who personally kicked victim in the head, shot victim in the head, slit victim's throat, and dragged victim's weighted body into the river was based on overwhelming evidence of defendant's culpability for truly heinous crime, and not imposed under influence of passion, prejudice, or any other arbitrary factor.

An Appeal from the District Court of Grady County; James R. Winchester, District Judge.

William Wayne Thompson, appellant, was convicted of First Degree Murder, in the District Court of Grady County, Case No. CRF-83-45, was sentenced to death, and he appeals. AFFIRMED.

E. Alvin Schay, Appellate Public Defender, Norman, for appellant.

Michael C. Turpen, Atty. Gen., William H. Luker, Asst. Atty. Gen., Oklahoma City, for appellee.

OPINION

BRETT, Judge:

Having been certified to stand trial as an adult, William Wayne Thompson was tried for First Degree Murder [21 O.S.1981, § 701.7(A)] in Grady County District Court, Case No. CRF-83-45. The jury found him guilty as charged and fixed his punishment at death. Judgment and sentence were rendered accordingly and appellant appeals. We affirm.

The evidence at trial showed that appellant, his brother Anthony James Mann, Bobby Glass, and Richard Jones murdered Charles Keene, the appellant's former brother-in-law, in the early morning hours of January 23, 1983. Keene was shot once in the head and once in the chest, and his throat, chest, and abdomen had been cut. He also had multiple bruises and abrasions, especially about his face and head, and his left leg was broken. Keene's body was chained to a concrete block and thrown into the Washita River, where it remained undiscovered until February 18, 1983. The four co-defendants were tried separately. Each received the death penalty.

[1] Appellant raises three assignments of error that pertain to the guilt stage of the trial. He first argues that the prosecutor "set the stage for a long line of requests for sympathy for the victim during voir dire." As trial counsel failed to object to any of these statements or questions, the alleged error has not been properly preserved for review. *See Nuckols v. State*, 690 P.2d 463 (Okl.Cr.1984). We conclude from our examination of the record that there was no fundamental error.

[2] Appellant relies on *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D.Ark.1983) for the proposition that excluding potential jurors simply because they are opposed to capital punishment denies the accused of a trial by a fair and impartial cross-section of the community. Since this appeal was filed, the *Grigsby* case has been affirmed by the circuit court, 758 F.2d 226 (8th Cir. 1985), but reversed by the Supreme Court *sub nom. Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). The United States Supreme Court rejected this proposition as did this Court in *Foster v. State*, 714 P.2d 1031 (Okl.Cr.1986). Moreover, this argument was not raised at trial and cannot, therefore, be raised on appeal. *See Nuckols*, 690 P.2d at 469.

[3, 4] Appellant's final assignment of error that would affect the conviction is that the trial court committed reversible error by admitting into evidence a video tape depicting the recovery of the victim's body from the river and three color photographs of the victim. Trial counsel objected to the exhibits on the basis that all were gruesome and more prejudicial than useful, that they only emphasized and re-emphasized matters that were covered less graphically by the medical examiner. The trial court found that the probative value of the photographs and video tape outweighed their prejudicial effect and that they were relevant to show the condition and location of the body at the time it was recovered.

We have viewed the video tape and did not find it to be gruesome. No close-up views of the body were shown to the jury. Admitting the tape into evidence was not error. Nor was it error to admit the photograph of the victim showing the chain wrapped around his legs and a concrete block as that picture was not particularly gruesome.

[5] The other two color photographs, however, were gruesome. Admitting them into evidence served no purpose other than to inflame the jury. We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value. We fail to see how

they could possibly assist the jury in the determination of defendant's guilt. The trial court's admission of these two photographs was error. *See Ozendine v. State*, 335 P.2d 940 (Okl.Cr.1958).

Nevertheless, the evidence against the appellant was so strong that the error does not require reversal. *See Newbury v. State*, 695 P.2d 531 (Okl.Cr.1985). Two witnesses—Donetta Bradford, appellant's girlfriend, and Charlesetta Garcia, Bobby Glass' girlfriend—testified that appellant told them that he had shot Charles in the head and cut his throat. Charlotte Mann, Anthony Mann's former wife, heard appellant tell his mother that Charles Keene was dead, that he had killed him, and that Vicki—the victim's ex-wife and the appellant's sister—did not have to worry about him anymore.

When appellant and the other co-defendants left their house on the evening of the murder, appellant told Bradford, "We're going to kill Charles." When they returned several hours later, appellant was wet from the chest down, his nose was bleeding, and he no longer had on the cap he had been wearing when he left.

Myrtle and Malcolm "Possum" Brown, who lived near the Washita River, returned from a vacation and retired early the night Charles Keene was killed. They were awakened by a gunshot and barking dogs. A man pounded on the door and shouted, "Possum, let me in. They're going to kill me." The Browns looked outside and saw three or four men beating another man. They heard one of the men say, "This is for the way you treated our sister." Mr. Brown telephoned the sheriff, but the men left soon after they realized the Browns were home and witnessing the fray. It was too dark for the Browns to identify any of the men.

The O.S.B.I. analyzed a stain on the Browns' front porch carpet and discovered it was caused by human blood group A, the same blood type of the victim. An expended .45 caliber Winchester Western cartridge case was found in the Browns' front yard; the same type of ammunition was used to kill Charles Keene. In the Browns' dogpen, fabric was found that had the same type design as the cap appellant had worn the night of the homicide.

The above recitation of facts is by no means exhaustive, but is demonstrative of how strong the evidence against appellant was. In view of this evidence, we cannot say that the two color photographs, although gruesome, affected the jury's determination that appellant was guilty as charged.

Finding no errors which would affect the conviction of first degree murder, we affirm that judgment. We turn now to a review of the sentencing.

Appellant alleges four categories of prosecutorial misconduct: comments requesting sympathy for the victim, comments arousing societal alarm, injecting matters not in evidence through improper cross-examination, and unfair characterization of the appellant. None of the statements falling in the first category were preserved for review as trial counsel made no objection. Having reviewed the record for fundamental error, we conclude that none of the comments warrant reversal or modification. *See Nuckols*, 690 P.2d at 471.

[6] The comments that appellant claims were designed to arouse societal alarm were in fact, as the trial judge ruled them to be, comments on the appellant's propensity to commit acts of violence in the future. As that was one of the aggravating circumstances alleged and supported by evidence, we find the comments to be a fair comment on the evidence and within the permissible range of closing argument.

The alleged improper cross-examination was of character witnesses called by the defense. Most of the questions were proper under 12 O.S.1981, § 2405, which states that "[i]nquiry is allowable on cross-examination into relevant specific instances of conduct."

[7] One question, however, was clearly improper. The prosecutor asked one defense witness whether he was related to

Cecil Leroy Cloud. When the witness responded that Mr. Cloud was his father's step-brother, the prosecutor said, "That's the same Cecil Leroy Cloud that we sent to the pen for shooting with intent to kill, correct." We agree with appellate counsel that "[i]njection of the criminal record of a distant relative of a witness has no place in a criminal proceeding, and could not be termed anything other than an intentional effort at hurting the case of the accused." Notwithstanding, no objection was made at trial and we believe that such an obviously "cheap shot" discredited the prosecutor more than the witness. The error was not prejudicial and does not warrant modification of the sentence.

[8] Appellant further complains that the prosecutor consistently sought to characterize him as being emotionally older than his chronological age. Defense counsel stressed appellant's youth as a mitigating factor, arguing that he should not be given the death penalty because he was young enough to change and improve himself. Defense counsel also tried to argue that appellant was a "normal little boy ... just like other little boys." The prosecutor's arguments to the contrary were proper inferences from the evidence. The evidence did not show William Wayne Thompson to be a typical sixteen-year-old, and the State properly argued that fact.

[9] The appellant's next proposition is that the execution of William Wayne Thompson, who was fifteen at the time of the offense, would constitute cruel and/or unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and under Article Two, Section Nine of the Oklahoma Constitution. The same arguments now made by appellant were made by appellate counsel in *Eddings v. State*, 616 P.2d 1159 (Okl.Cr. 1980). This Court, unanimously rejecting the arguments, found that imposition of the death penalty on a minor certified to stand trial as an adult constitutes neither cruel nor unusual punishment. *Id.* at 1166–67.

The United States Supreme Court granted certiorari on the issue, *Eddings v. Oklahoma*, 450 U.S. 1040, 101 S.Ct. 1756, 68 L.Ed.2d 237 (1981), but then decided the case on another ground. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Upon reconsideration of the issue, we reaffirm our previous holding that once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult.

[10] Next appellant argues that failure of the prosecutor to present evidence of specific aggravating circumstances at the preliminary hearing deprived the trial court of jurisdiction to sentence him to death. This Court has repeatedly rejected this argument. *See, e.g., Nuckols*, 690 P.2d at 469–70; *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1983). As a subproposition of error the appellant claims that the State failed to inform him of the evidence in aggravation it intended to present. The record, however, indicates that notice was given three months before trial. This assignment of error is totally without merit.

In the next assignment of error, appellant urges this Court to overrule the portion of *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980), *rev'd in part on other grounds sub nom. Chaney v. Brown*, 730 P.2d 1334 (10th Cir.1984), that held that the instructions given provided the jury sufficient guidance to prevent an arbitrary or discriminatory application of the death penalty. *See id.* at 279–80. Substantially the same instructions were given in the case at bar, and we find them to be adequate for constitutional purposes. Furthermore, the instructions were not objected to at trial.

[11] Appellant argues next that examination of one of its witnesses—the seven-year-old son of the victim—was improperly restricted by the court. The record does not bear out this allegation. The transcript of the proceedings conducted in chambers shows exactly what questions defense counsel wanted to ask. The trial court did instruct trial counsel not to ask other types of questions, but defense counsel neither

indicated that he wished to do so nor objected to the limitation.

[12] That the trial court erred in failing to instruct the jury, sua sponte, that he would impose a life sentence if they could not reach a verdict within a reasonable time is appellant's next contention. This Court has held that it is not even error to refuse to give such an instruction if it is requested. *Brogie v. State*, 695 P.2d 538 (Okl.Cr.1985). The trial court did not err.

[13] The appellant argues that the Eighth and Fourteenth Amendments to the United States Constitution do not permit the imposition of the death penalty because this Court has been evaluating the heinous-atrocious-cruel aggravating circumstance in an arbitrary manner. The death penalty convictions affirmed by this Court in which this aggravating circumstance has been found to exist have consistently passed constitutional challenge. *See Cooks v. State*, 699 P.2d 653 (Okl.Cr.), *cert. denied*, — U.S. —, 106 S.Ct. 268, 88 L.Ed.2d 275 (1985); *Cartwright v. State*, 695 P.2d 548 (Okl.Cr.), *cert. denied*, —U.S. —, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985); *Stout v. State*, 693 P.2d 617 (Okl.Cr.1984), *cert. denied*, — U.S. —, 105 S.Ct. 3489, 87 L.Ed.2d 623 (1985); *Nuckols v. State*, 690 P.2d 463 (Okl.Cr.1984), *cert. denied*, — U.S. —, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Robison v. State*, 677 P.2d 1080 (Okl.Cr.), *cert. denied*, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984); *Davis v. State*, 665 P.2d 1186 (Okl.Cr.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983). Furthermore, the manner in which the murder was accomplished in this case was obviously heinous, atrocious or cruel. Before dying, the victim was severely beaten, had his leg broken, his throat and chest slashed, and knew for some time that his attackers ultimately were going to kill him.

[14] Dr. Helen Kline, a clinical psychologist and director of the psychology department at Central State Hospital testified at the sentencing stage of the trial. Her testimony was used solely to prove the existence of a probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society.

Appellant argues that his Fifth and Sixth Amendment rights were violated because he was not warned of his right to remain silent during the two interviews with Dr. Kline, or that anything he said could be used against him. The original record was silent in this regard until appellant filed an affidavit dated November 21, 1985, stating he was not so warned. The State filed an affidavit dated April 1, 1986, saying she did warn him.

The United States Supreme Court has held that a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. When a defendant is faced while in custody with a court-ordered psychiatric inquiry, the State may use his statements at the penalty phase only if the defendant was apprised of his rights and knowingly decided to waive them. *Estelle v. Smith*, 451 U.S. 454, 468–69, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359 (1981).

Appellant claims that his failure to object when Dr. Kline testified does not constitute waiver of this claim because the Supreme Court did not require a timely, specific trial objection in *Smith*. The Supreme Court, however, gave its reasons for rejecting the State's waiver argument,[1] and none of

1. The Supreme Court agreed with the Court of Appeals' reasons, to wit: that the State did not timely raise this argument; that objecting would have been a futile act under Texas law; and that defendant Smith's objection was essentially surprise. *Smith*, 451 U.S. at 468, n. 12, 101 S.Ct. at 1876 n. 12.

those reasons are applicable to the case at bar. Thus, we conclude that regardless of whether appellant was warned, he has forfeited this argument by failing to assert the claim at a time when the trial judge could have prevented any error.

[15] Finally, appellant, relying on *Ake v. Oklahoma*, — U.S. —, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), argues that because the State utilized psychiatric testimony, it was error not to afford appellant a psychiatric witness to counter the State's evidence. Appellant does not allege that funds for a psychiatric witness were requested.

Even if a psychiatric witness was required by *Ake*, the *Ake* Court's reason for its ruling was to prevent the State from having a strategic advantage over a defendant that would create a risk of error in the proceeding absent a defense witness to counter-balance the State's expert testimony. In the case at bar, any advantage the State may have had was fruitless since the jury did not find the existence of the aggravating circumstance that the State intended to prove by Dr. Kline's testimony. Error, if any, was harmless and not cause for modification or reversal. *See* 20 O.S.1981 § 3001.1.

Having addressed all the errors alleged by the appellant, this Court now turns to a determination of whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the jury's finding that the murder was especially heinous, atrocious, or cruel. 21 O.S.Supp.1985, § 701.13.

[16] The victim herein was abducted from his home, severely beaten by four men, shot twice, and had his leg broken and his throat and chest slashed with a knife. When he attempted to escape and had a chance to call out for help, he was thrown into the trunk of a car. These facts amply support the conclusion that the murder was heinous, atrocious, or cruel.

[17] The record discloses nothing to indicate that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Although appellant was the youngest of the four assailants, his participation was hardly minimal. The evidence showed that he personally kicked the victim in the head, shot the victim in the head, slit the victim's throat, and dragged the victim's weighted body into the river. The jury's decision clearly was based on the overwhelming evidence of appellant's culpability for this truly heinous crime.

The judgment and sentence are hereby AFFIRMED.

PARKS, P.J., and BUSSEY, J., specially concur.

PARKS, Presiding Judge, specially concurring:

I agree with all that my brother Judge Brett has stated in this opinion. However, I write separately to consider whether the sentence of death in this case "is excessive or disproportionate ..., considering both the crime and defendant." This consideration is missing from the Court's opinion. 21 O.S.1981, § 701.13(C). Although our Legislature has revised this statute somewhat in 1985 Okla.Sess.Laws, Ch. 265, now codified at 21 O.S.Supp.1985, § 701.13, I believe application of this revision to cases pending on appeal at the time the law was enacted would render the new provision an *ex post facto* law. *See Green v. State*, 713 P.2d 1032, 1041 n. 4 (Okl.Cr.1985). Nevertheless, I have personally compared the

sentence imposed herein with those previous cases either affirmed [1] or modified [2] by this Court, and find the sentence to be proper.

BUSSEY, Judge, specially concurring.

Finding no error warranting reversal or modification, I agree that the judgment and sentence should be affirmed.

1. *Ross v. State*, 717 P.2d 117 (Okl.Cr.1986); *Foster v. State*, 714 P.2d 1031 (Okl.Cr.1986); *Green v. State*, 713 P.2d 1032 (Okl.Cr.1986); *Liles v. State*, 702 P.2d 1025 (Okl.Cr.1985); *Cooks v. State*, 699 P.2d 653 (Okl.Cr.1985); *Banks v. State*, 201 P.2d 418 (Okl.Cr.1985); *Cartwright v. State*, 695 P.2d 548 (Okl.Cr.1985); *Brogie v. State*, 695 P.2d 538 (Okl.Cr.1985); *Bowen v. State*, 715 P.2d 1093, 55 O.B.J. 2520 (Okl.Cr.1984); *Stout v. State*, 693 P.2d 617 (Okl.Cr.1984); and *Nuckols v. State*, 690 P.2d 463 (Okl.Cr.1984); *Robison v. State*, 677 P.2d 1080 (Okl.Cr.1984); *Dutton v. State*, 674 P.2d 1134 (Okl.Cr.1984); *Stafford v. State*, 669 P.2d 285 (Okl.Cr.1983); *Coleman v. State*, 668 P.2d 1126 (Okl.Cr.1983); *Stafford v. State*, 665 P.2d 1205 (Okl.Cr.1983); *Davis v. State*, 665 P.2d 1186 (Okl.Cr.1983); *Ake v. State*, 663 P.2d 1 (Okl.Cr.1983); *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982); *Jones v. State*, 648 P.2d 1251 (Okl.Cr. 1982); *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980); and *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980), *modified* on other grounds, *sub. nom., Chaney v. Brown*, 730 F.2d 1334 (10th Cir.1984).

2. *Green v. State*, 713 P.2d 1032 (Okl.Cr.1985); *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.1980); as *modified*, 688 P.2d 342 (Okl.Cr.1984); *Morgan v. State*, No. F-79-487 (Okl.Cr. Nov. 14, 1983) (Unpublished); *Johnson v. State*, 665 P.2d 815 (Okl.Cr.1982); *Glidewell v. State*, 663 P.2d 738 (Okl.Cr.1983); *Jones v. State*, 660 P.2d 634 (Okl.Cr.1983); *Driskell v. State*, 659 P.2d 343 (Okl.Cr.1983); *Bourwell v. State*, 659 P.2d 322 (Okl.Cr.1983); *Munn v. State*, 658 P.2d 482 (Okl.Cr.1983); *Odum v. State*, 651 P.2d 703 (Okl.Cr. 1982); *Burrows v. State*, 640 P.2d 532 (Okl.Cr. 1982); *Franks v. State*, 636 P.2d 361 (Okl.Cr. 1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980).

PERTINENT OKLAHOMA STATUTES RESPECTING DEFINITION OF "CHILD" AND TRIAL OF CHILDREN AS ADULTS

10 Okla. Stat.

§ 1101. Definitions

When used in this title, unless the context otherwise requires:

1. "Child" means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy.

§ 1104.2. Persons 16 or 17 years of age to be considered as adult for committing certain offenses—Warrants—Certification as child

A. Any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the second degree, use of firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy, shall be considered as an adult. Upon the arrest and detention, such sixteen- or seventeen-year-old accused shall have all the statutory and constitutional rights and protections of an adult accused of a crime, but shall be detained in a jail cell or ward entirely separate from prisoners who are eighteen (18) years of age or over.

B. Upon the filing of an information against such accused person, a warrant shall be issued which shall set forth the rights of the accused person, and the rights of the parents, guardian or next friend of the accused person to be present at the preliminary hearing, to have an attorney present and to make application for certification of such accused person as a child to the juvenile division of the district court. The warrant shall be personally served together with a certified copy of the information on the accused person and on the parents, guardian or next friend of the accused person.

C. The accused person shall file a motion for certification as a child before the start of the criminal preliminary hearing. Upon the filing of such motion, the complete juvenile record of the accused shall be made available to the district attorney and the accused person.

At the conclusion of the state's case at the criminal preliminary hearing, the accused person may offer evidence to support the motion for certification as a child.

The court shall rule on the certification motion of the accused person before ruling on whether to bind the accused over for trial. When ruling on the certification motion of the accused person, the court shall give consideration to the following guidelines, listed in order of importance:

1. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

2. Whether the offense was against persons or property, greater weight being given for retaining the accused person within the adult criminal system for offenses against persons, especially if personal injury resulted;

3. The record and past history of the accused person, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and

4. The prospects for adequate protection of the public if the accused person is processed through the juvenile system.

The court, in its decision on the certification motion of the accused person, need not detail responses to each of the above considerations, but shall state that the court has considered each of the guidelines in reaching its decision.

D. Upon completion of the criminal preliminary hearing, if the accused person is certified as a child to the juvenile division of the district court, then all adult court records relative to the accused person and this charge shall be expunged and any mention of the accused person shall be removed from public record.

§ 1112. Children charged with violating state statute or municipal ordinance—Juvenile proceedings—Felonies—Trial as adult—Matters considered—Bail

(a) Except as otherwise provided, a child who is charged with having violated any state statute or municipal ordinance other than those enumerated in Section 1104.2 of this title, shall not be tried in a criminal action but in a juvenile proceeding. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the district court or municipal court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the district court. The division making such transfer shall order the child to be taken forthwith to the place of detention designated by the juvenile division, to that division itself, or release such child to the custody of some suitable person to be brought before the juvenile division. However, nothing in this act shall be construed to prevent the exercise of concurrent jurisdiction by another division of the district court or by municipal courts in cases involving children wherein the child is charged with the violation of a state or municipal traffic law or ordinance.

(b) Except as otherwise provided by law, if a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult, the court on its own motion or at the request of the district attorney shall conduct a preliminary hearing to determine whether or not there is prosecutive merit to the complaint. If the court finds that prosecutive merit exists, it shall continue the hearing for a sufficient period of time to conduct an investigation and further hearing to determine the prospects for reasonable rehabilitation of the child if he should be found to have committed the alleged act or omission.

Consideration shall be given to:

1. The seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

2. Whether the offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted;

3. The sophistication and maturity of the juvenile and his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living;

4. The record and previous history of the juvenile, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions;

5. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile if he is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court; and

6. Whether the offense occurred while the juvenile was escaping or in an escape status from an institution for delinquent children.

After such investigation and hearing, the court may in its discretion proceed with the juvenile proceeding, or it shall state its reasons in writing and shall certify that such child shall be held accountable for its acts as if he were an adult and shall be held for proper criminal proceedings for the specific offense charged, by any other division of the court which would have trial jurisdiction of such offense if committed by an adult. The juvenile proceeding shall not be dismissed until the criminal proceeding has commenced and if no criminal proceeding has commenses within thirty (30) days of the date of such certification, unless stayed pending appeal, the court shall proceed with the juvenile proceeding and the certification shall lapse.

If not included in the original summons, notice of a hearing to consider whether a child should be certified for trial as an adult shall be given to all persons who are required to be served with a summons at the commencement of a juvenile proceeding, but publication in a newspaper when the address of a person is unknown is not required. The purpose of the hearing shall be clearly stated in the notice.

(c) Prior to the entry of any order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances.

(d) Any child who has been certified to stand trial as an adult pursuant to any certification procedure provided by law and is subsequently convicted of the alleged offense or against whom the imposition of judgment and sentencing has been deferred shall be tried as an adult in all subsequent criminal prosecutions, and shall not be subject to the jurisdiction of the juvenile court in any further proceedings.

(e) An order either certifying a person as a child pursuant to subsection (b) of this section or denying such certification shall be a final order, appealable when entered.

§ 701.7. Murder in the first degree

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

C. A person commits murder in the first degree when the death of a child results from the injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title.

Amended by Laws 1982, c. 279, § 1, operative Oct. 1, 1982.
Approved May 21, 1982. Emergency.
Section 2 of Laws 1982, c. 279 provides for an operative date.

§ 701.9. Punishment for murder

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

Laws 1976, 1st Ex.Sess., c. 1, § 3, eff. July 24, 1976.

§ 701.10. Sentencing proceeding—Murder in the first degree

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Laws 1976, 1st Ex.Sess., c. 1, § 4, eff. July 24, 1976.

§ 701.11. Instructions—Jury findings of aggravating circumstance

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life. Laws 1976, 1st Ex.Sess., c. 1, § 5, eff. July 24, 1976.

§ 701.12. Aggravating circumstances

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Laws 1976, 1st Ex.Sess., c. 1, § 6, eff. July 24, 1976; Laws 1981, c. 147, § 1, emerg. eff. May 8, 1981.
Section 4 of Laws 1981, c. 147 provides for severability.

CERTIFICATE OF SERVICE

86-6169

This is to certify that a copy of the foregoing Affidavit of William Wayne Thompson has been served by the United States mail, postage prepaid, on Michael C. Turpen, Attorney General of the State of Oklahoma, this 9th day of January, 1987.

Harry F. Tepker, Jr.

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